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Raj Dosanjh

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EXAMINER

VETTER, DANIEL

ART UNIT

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/630,432
Filing Date: July 29, 2003
Appellant(s): DOSANJH, RAJ

Charles W. Griggers
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed August 8, 2008 appealing from the Office action mailed March 4, 2008.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

A new grounds of rejection under 35 U.S.C. 101 appears in Paragraph 9 below.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

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(8) Evidence Relied Upon

Patents:

6,021,402	TAKRITI	2-2000
6,327,541	PITCHFORD	12-2001
5,963,920	ROSE	10-1999

Other References:

Call for Participation: HotOS-VII, "Seventh Workshop on Hot Topics in Operating Systems," Mar 29-30, 1999

Thefreedictionary.com, "information technology," available at <http://encyclopedia.fadex.com/p/information+technology> accessed May 22, 2007

Redhat, "The Storage Spectrum," available at <http://www.redhat.com/docs/manuals/linux/RHL-8.0-Manual/admin-primer/s1-memory-spectrum.html> accessed May 23, 2007

Redhat, "Processing Power," available at <http://www.redhat.com/docs/manuals/linux/RHL-9-Manual/admin-primer/s1-bandwidth-processing.html> accessed May 23, 2007

Thefreedictionary.com, "tech support," available at <http://computing-dictionary.thefreedictionary.com/p/tech+support> accessed May 22, 2007

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following rejection under 35 U.S.C. 101 is anew grounds of rejection

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Claim Rejections - 35 USC § 101

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claims 1, 2, and 4-11 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

Claims 1, 2, and 4-11 are directed to a series of steps. In order for a series of steps to be considered a proper process under § 101, a claimed process should either: (1) be tied to another statutory class (such as a particular apparatus) or (2) transform underlying subject matter (such as an article or materials). *Diamond v. Diehr*, 450 U.S. 175, 184 (1981); *Parker v. Flook*, 437 U.S. 584, 588 n.9 (1978); *Gottschalk v. Benson*, 409 U.S. 63, 70 (1972). Thus, to qualify as patent eligible, these processes must positively recite the other statutory class to which it is tied (e.g., by identifying the apparatus that accomplishes the method steps), or positively recite the subject matter that is being transformed (e.g., by identifying the product or material that is changed to a different state). The claims do not recite any specific computerized or mechanical apparatus used to perform the price determination. And while the claimed invention is related to actual commodity provision, no step is actually implemented to affect a physical transformation in the real world, only abstract determinations. The claim does recite "effecting provision . . . of the commodity," however this alone does not qualify as a transformation as no physical items are changed to a different state. Additionally, the term "commodity" as used in the application explicitly includes abstract services such as tech support. Claim 11 recites that the method of claim 1 is "executed using a computer program." However, this is merely a nominal recitation of a structure, and no details are provided as to how this structure affects the steps of the process. Moreover, only a "computer program" is claimed. Functional descriptive material such as a computer program must be structurally and functionally interrelated with a physical medium to allow its intended uses to be realized. See MPEP § 2106.01. As such, the claims concretely identify neither the apparatus performing the recited steps nor any

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transformation of underlying materials, and accordingly are directed to non-statutory subject matter.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 4-7, 11-13, 15-18, 23, and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Takriti, U.S. Pat. No. 6,021,402 (Reference A of the PTO-892 part of paper no. 20061207) in view of Pitchford, et al., U.S. Pat. No. 6,327,541 (Reference B of the PTO-892 part of paper no. 20061207) and Rose, et al., U.S. Pat. No. 5,963,920 (Reference A of the PTO-892 part of paper no. 20070913).

As per claim 1, Takriti teaches a method of determining a price at which a supplier provides a commodity to a customer, the method being performed by the supplier and comprising: characterizing nature of growth of the customer's usage of the commodity (col. 7, lines 59-60); receiving information from the customer specifying the commodity required (col. 7, lines 65-67); and determining a price for the commodity used (col. 7, lines 30-31; col. 8, line 17), the determined price being dependent on a level of commercial risk associated with the nature of growth of the customer's usage of the commodity (col. 8, lines 60-62), and an industry average price for the commodity at the time of determination of the price (col. 5, lines 2-3). Takriti does not explicitly teach receiving notification of the use of a quantity of the commodity by the customer, and that the determined price is dependent on the quantity of the commodity used by the customer; and if the usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer. Pitchford teaches receiving notification of the use of a quantity of the commodity by the customer (col. 3, lines 7-11),

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and that the determined price is dependent on the quantity of the commodity used by the customer (col. 10, line 26). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate receiving notification of the use of a quantity of the commodity by the customer, and that the determined price is dependent on the quantity of the commodity used into the method taught by Takriti in order to provide an energy management system that provides data in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67). Pitchford further teaches if the usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer (col. 5, lines 11-14). It would have been prima facie obvious to incorporate if the usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer into the method taught by Takriti in view of Pitchford in order to meet the particular requirements of a particular user site (as taught by Pitchford, col. 5, line 12). Takriti in view of Pitchford does not explicitly teach the method is performed by the supplier; which is taught by Rose (col. 2, lines 39-49). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above teachings of Rose into the method taught by Takriti in view of Pitchford so that the supplier can be informed of up to the minute commodity needs of the customer (as taught by Rose; col. 2, lines 51-52).

As per claim 2, Takriti in view of Pitchford and Rose teaches the method of claim 1 as described above. Pitchford further teaches that the step of receiving notification of the use of a quantity of the commodity further comprises monitoring the customer's usage of the commodity (col. 3, line 8). It would have been prima facie obvious to incorporate the above teachings of Pitchford into the method taught by Takriti in view of Pitchford and Rose in order to provide an energy management system that provides data in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67).

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As per claim 4, Takriti in view of Pitchford and Rose teaches the method of claim 2 as described above. Takriti further teaches the customer's usage history of the commodity, as monitored by the supplier, is used to dynamically reassess the nature of growth of the customer's usage of the commodity, and the associated level of commercial risk (col. 7, lines 59-60; col. 8, line 61).

As per claim 5, Takriti in view of Pitchford and Rose teaches the method of claim 1 as described above. Takriti teaches that the nature of growth of the customer's usage of the commodity is characterised (col. 7, lines 59-60) and that a level of commercial risk is determined (col. 8, line 53). However, Takriti in view of Pitchford and Rose does not teach that the characterizations are constant growth, explosive growth or volatile growth and that the level of commercial risk is low, high or intermediate. These characterizations and levels are merely recitations of non-functional descriptive material. It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate these characterizations into the method taught by Takriti in view of Pitchford and Rose because non-functional descriptive material cannot render non-obvious an invention that would otherwise have been obvious. *In re Gulack*, 703 F.2d 1381, 1385; 217 USPQ 401, 404 (Fed. Cir. 1983).

As per claim 6, Takriti in view of Pitchford and Rose teaches the method of claim 1 as described above. Takriti further teaches in the step of receiving information from the customer specifying the commodity required, the commodity is selected from a plurality of alternatives in a same category of commodity (col. 8, line 49; Examiner is interpreting types of fuel as alternatives within the same category of the commodity electricity).

As per claim 7, Takriti in view of Pitchford and Rose teaches the method of claim 6 as described above. Pitchford further teaches the same category of commodity is one of a plurality of categories and a selection is made from more than one category (col. 7, lines 15-20), and wherein the alternatives available for selection in each category are modified in response to customer's preference data, or on the basis of previously-selected commodities (col. 5, lines 2-4; col. 6, lines 56-61). It would have been prima

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facie obvious at the time of invention to incorporate the above teachings of Pitchford into the method taught by Takriti in view of Pitchford and Rose in order to provide an energy management system that provides data in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67).

As per claim 11, Takriti in view of Pitchford and Rose teaches the method of claim 1 as described above. Takriti further teaches the method is executed using a computer program (Abstract).

As per claim 12, Takriti teaches a computer readable storage medium for storing a computer program (Abstract) operable to determine a price at which a supplier provides a commodity to a customer, the computer program being operable to: receive input characterising nature of growth of the customer's usage of the commodity (col. 7, lines 59-60); receive input specifying the commodity required by the customer (col. 7, lines 65-67); and determine a price for the commodity used (col. 7, lines 30-31), the determined price being dependent on a level of commercial risk associated with the nature of growth of the customer's usage of the commodity (col. 8, lines 60-62), and an industry average price for the commodity at the time (col. 5, lines 2-3). Takriti does not explicitly teach that the program is operable to receive input comprising notification of the use of a quantity of the commodity by the customer, and that the determined price is dependent on the quantity of the commodity used; and if the usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer. Pitchford teaches that the program is operable to receive input comprising notification of the use of a quantity of the commodity by the customer (col. 3, lines 7-11), and that the determined price is dependent on the quantity of the commodity used (col. 10, line 26). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate that the program is operable to receive input comprising notification of the use of a quantity of the commodity by the customer, and that the determined price is dependent on the quantity of the commodity used into the program taught by Takriti in order to provide an energy management system that provides data

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in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67). Pitchford further teaches if the usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer (col. 5, lines 11-14). It would have been prima facie obvious to incorporate if the usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer into the program taught by Takriti in view of Pitchford in order to meet the particular requirements of a particular user site (as taught by Pitchford, col. 5, line 12). Takriti in view of Pitchford does not explicitly teach the method is performed by the supplier; which is taught by Rose (col. 2, lines 39-49). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above teachings of Rose into the medium taught by Takriti in view of Pitchford so that the supplier can be informed of up to the minute commodity needs of the customer (as taught by Rose; col. 2, lines 51-52).

As per claim 13, Takriti in view of Pitchford and Rose teaches the medium of claim 12 as described above. Pitchford further teaches the program operable to receive data from a remote device specifying the usage of the commodity by the customer (col. 5, lines 15-20). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above teachings of Pitchford into the program taught by Takriti in view of Pitchford and Rose in order to provide an energy management system that provides data in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67).

As per claim 15, Takriti in view of Pitchford and Rose teaches the medium of claim 13 as described above. Takriti further teaches the program operable to interpret the customer's usage history of the commodity to dynamically reassess the nature of growth of the customer's usage of the commodity, and the associated level of commercial risk (col. 7, lines 59-60; col. 8, line 61).

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As per claim 16, Takriti in view of Pitchford and Rose teaches the medium of claim 12 as described above. Takriti teaches that the nature of growth of the customer's usage of the commodity is characterised (col. 7, lines 59-60) and that a level of commercial risk is determined (col. 8, line 53). However, Takriti in view of Pitchford and Rose does not teach that the characterizations are constant growth, explosive growth or volatile growth and that the level of commercial risk is low, high or intermediate. These characterizations and levels are merely recitations of non-functional descriptive material. It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate these characterizations into the program taught by Takriti in view of Pitchford and Rose because non-functional descriptive material cannot render non-obvious an invention that would otherwise have been obvious. *Gulack*, 217 USPQ at 404.

As per claim 17, Takriti in view of Pitchford and Rose teaches the medium of claim 12 as described above. Takriti further teaches when receiving input specifying the commodity required by the customer, the commodity is selected from a plurality of alternatives in a same category of commodity (col. 8, line 49; Examiner is interpreting types of fuel as alternatives within the same category of the commodity electricity).

As per claim 18, Takriti in view of Pitchford and Rose teaches the medium of claim 17 as described above. Pitchford further teaches the same category of commodity is one of a plurality of categories and a user makes a selection from more than one category (col. 7, lines 15-20), and wherein the computer program modifies the alternatives available for selection in each category following input of customer preference data, or on the basis of previously-selected commodities (col. 5, lines 2-4; col. 6, lines 56-61). It would have been prima facie obvious at the time of invention to incorporate the above teachings of Pitchford into the program taught by Takriti in view of Pitchford and Rose in order to provide an energy management system that provides data in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67).

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As per claim 23, Takriti teaches a price determination device comprising a processor (Abstract) operable to implement a method of determining a price at which a supplier provides a commodity to a customer, the method comprising: characterizing nature of growth of the customer's usage of the commodity (col. 7, lines 59-60); receiving information from the customer specifying the commodity required (col. 7, lines 65-67); and determining a price for the commodity used (col. 7, lines 30-31), the determined price being dependent on a level of commercial risk associated with the nature of growth of the customer's usage of the commodity (col. 8, lines 60-62), and an industry average price for the commodity at the time of determination of the price (col. 5, lines 2-3). Takriti does not explicitly teach receiving notification of the use of a quantity of the commodity by the customer, and that the determined price is dependent on the quantity of the commodity used. Pitchford teaches receiving notification of the use of a quantity of the commodity by the customer (col. 3, lines 7-11), and that the determined price is dependent on the quantity of the commodity used (col. 10, line 26). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate receiving notification of the use of a quantity of the commodity by the customer, and that the determined price is dependent on the quantity of the commodity used into the device taught by Takriti in order to provide an energy management system that provides data in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67). Takriti in view of Pitchford does not explicitly teach the method is performed by the supplier; which is taught by Rose (col. 2, lines 39-49). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above teachings of Rose into the device taught by Takriti in view of Pitchford so that the supplier can be informed of up to the minute commodity needs of the customer (as taught by Rose; col. 2, lines 51-52).

As per claim 24, Takriti teaches price determination device comprising a processor (Abstract) executing a program to determine a price at which a supplier provides a commodity to a customer, the program being operable to cause the

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processor to: receive input characterising nature of growth of the customer's usage of the commodity (col. 7, lines 59-60); receive input specifying the commodity required by the customer (col. 7, lines 65-67); and determine a price for the commodity used (col. 7, lines 30-31), the determined price being dependent on a level of commercial risk associated with the nature of growth of the customer's usage of the commodity (col. 8, lines 60-62), and an industry average price for the commodity at the time (col. 5, lines 2-3). Takriti does not explicitly teach the device operable to receive input comprising notification of the use of a quantity of the commodity by the customer, and that the determined price is dependent on the quantity of the commodity used. Pitchford teaches the device operable to receive input comprising notification of the use of a quantity of the commodity by the customer (col. 3, lines 7-11), and that the determined price is dependent on the quantity of the commodity used (col. 10, line 26). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the device operable to receive input comprising notification of the use of a quantity of the commodity by the customer, and that the determined price is dependent on the quantity of the commodity used into the device taught by Takriti in order to provide an energy management system that provides data in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67). Takriti in view of Pitchford does not explicitly teach the method is performed by the supplier; which is taught by Rose (col. 2, lines 39-49). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above teachings of Rose into the device taught by Takriti in view of Pitchford so that the supplier can be informed of the up to minute commodity needs of the customer (as taught by Rose; col. 2, lines 51-52).

Claims 8-10 and 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Takriti in view of Pitchford and Rose as applied to claims 1 and 12 above, and further in view of Official Notice as supported by documentary evidence provided in the Office action mailed May 30, 2007.

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As per claim 8, Takriti in view of Pitchford and Rose teaches the method of claim 1 as described above. Takriti in view of Pitchford and Rose does not teach that the commodity price determination is done in the information technology industry. Official Notice had been taken and previously supported by documentary evidence in the Office action mailed May 30, 2007 that it is old and well established that the information technology industry uses various commodities, such as power and processor availability (see e.g., *Call for Participation: Seventh Workshop on Hot Topics in Operating Systems*, Reference U of the PTO-892 part of paper no. 20061207; hereinafter "HotOS-VII"). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above finding of Official Notice into the method taught by Takriti in view of Pitchford and Rose because the information technology industry uses various commodities which must be priced by their suppliers.

As per claim 9, Takriti in view of Pitchford, Rose, and Official Notice teaches the method of claim 8 as described above. Takriti in view of Pitchford and Rose does not teach the categories of commodities include storage capacity, server processing capability, and level of support service required. Official Notice had been taken and previously supported by documentary evidence in the Office action mailed May 30, 2007 that it is old and well established that the information technology industry uses the commodities of storage capacity, server processing capability, and support service (see e.g., HotOS-VII). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above finding of Official Notice into the method taught by Takriti in view of Pitchford, Rose, and Official Notice because they are some of the main inputs into computers and computer networks, which are the backbone of the information technology industry.

As per claim 10, Takriti in view of Pitchford, Rose, and Official Notice teaches the method of claim 9 as described above. Official Notice had been taken regarding the commodities of storage capacity or server processing capability as described above. Pitchford further teaches the step of receiving notification of the use of a quantity of the commodity is performed using monitoring and reporting software or hardware installed

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on a server of the customer (col. 6, lines 35-45). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above teachings of Pitchford into the method taught by Takriti in view of Pitchford, Rose, and Official Notice in order to provide an energy management system that provides data in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67).

As per claim 19, Takriti in view of Pitchford and Rose teaches the program of claim 12 as described above. Takriti in view of Pitchford and Rose does not teach that the commodity price determination is done in the information technology industry. Official Notice had been taken and previously supported by documentary evidence in the Office action mailed May 30, 2007 that it is old and well established that the information technology industry uses various commodities, such as power and processor availability (see e.g., HotOS-VII). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above finding of Official Notice into the program taught by Takriti in view of Pitchford and Rose because the information technology industry uses various commodities which must be priced by their suppliers.

As per claim 20, Takriti in view of Pitchford, Rose, and Official Notice teaches the program of claim 19 as described above. Takriti in view of Pitchford and Rose does not teach the categories of commodities include storage capacity, server processing capability, and level of support service required. Official Notice had been taken and previously supported by documentary evidence in the Office action mailed May 30, 2007 that it is old and well established that the information technology industry uses the commodities of storage capacity, server processing capability, and support service (see e.g., HotOS-VII). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above finding of Official Notice into the program taught by Takriti in view of Pitchford, Rose, and Official Notice because they are some of the main inputs into computers and computer networks, which are the backbone of the information technology industry.

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As per claim 21, Takriti in view of Pitchford, Rose, and Official Notice teaches the program of claim 19 as described above. Pitchford further teaches the data specifying the usage of the commodity by the customer is supplied from monitoring software or hardware installed on a server of the customer (col. 6, lines 35-45). It would have been prima facie obvious to one having ordinary skill in the art at the time of invention to incorporate the above teachings of Pitchford into the method taught by Takriti in view of Pitchford, Rose, and Official Notice in order to provide an energy management system that provides data in terms of consumption, demand, cost per rate of consumption, or total cost (as taught by Pitchford, col. 2, lines 65-67).

(10) Response to Argument

Takriti teaches a commodity system wherein commercial risk is accounted for in price determination. Takriti does not explicitly teach customer notification, monitoring, and variable provision functionalities, but these elements are disclosed in Pitchford. Neither of these two references explicitly discloses that the commodity supplier performs the monitoring and decision-making functions instead of the customer. Rose demonstrates that it is old and well known for a commodity supplier to monitor usage at remote customer sites and make supply decisions to meet their respective needs. Thus, the invention is merely a combination of old elements. In the combination no element would have served a purpose other than it already did independently, and one skilled in the art would have recognized that the combination could be implemented through routine engineering producing predictable results. The claimed invention therefore does not meet the standard for unobviousness set forth in *KSR v. Teleflex*; specifically, that "the improvement is more than the predictable use of prior art elements according to their established functions." *KSR International Co. v. Teleflex Inc.*, 550 U.S. ___, 82 USPQ2d 1385, 1396 (2007). Accordingly, because the claims do not meet this standard, and Appellant has provided no actual evidence to the contrary, the rejection of claims 1, 2, 4-7, 11-13, 15-18, 23, and 24 under § 103(a) should be affirmed.

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Appellant's arguments filed in the Appeal Brief nowhere address the actual reasoning used in combining these references to arrive at the above rejections. The Appeal Brief sets forth a series of piecemeal arguments that address the teachings of Takriti and Pitchford on their merits one at a time, each time alleging that they fail to teach whole elements and limitations they were not even relied upon to demonstrate. For example, Appellant repeatedly focuses on remote supplier characterizations of customer commodity use. E.g., Appeal Brief, 7-9. While the primary reference shows price characterizations incorporating risk based on usage, Rose rather than Takriti is relied upon to demonstrate that remote supplier characterizations are old and well-known in the art of commodity supply. Any allegation of the deficiencies of Takriti must acknowledge its combination with Pitchford and Rose. One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Appellant fails to present a single articulated argument that the combined disclosures of these three references, considered together and not separately, would not provide sufficient teachings to render the claimed invention obvious to one skilled in the art. Only conclusory statements are made to that effect. Additionally, the rationale used to combine the references in the manner set forth in the rejections under § 103(a) is not disputed. A prima facie case of obviousness is properly illustrated in the rejections above, and Appellant has not provided sufficient reasoned analysis to rebut it.

Appellant also argues that Rose is not sufficient to teach that a remote supplier monitors a customer's use and supply, as relied upon in the rejections above. Appeal Brief, 9-10. However, the arguments presented specifically with respect to Rose mischaracterize its actual disclosure. Appellant states that "Rose describes that the status of a storage rack for a supplier is monitored and provided to the supplier which enables the supplier to determine the status of its inventory and whether the supplier should reorder supplies to restock its inventory." Appeal Brief, 9. And further, "Rose describes that a supplier monitors its own inventory levels so that it may maintain

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inventory levels above a desired level." Appeal Brief, 9 (emphasis added). Contrary to these assertions, Rose describes the monitoring of a remote customer's commodity usage, by the customer's commodity supplier; rather than the system Appellant posits wherein a supplier monitors its own usage. "The supplier can thus monitor the instantaneous inventory status of a remotely located customer" Rose, col. 2, lines 39-40 (emphasis added). Rose's system also serves to allow comparisons between current and historical usage to make characterizations of a customer's commodity use. Rose, col. 2, lines 42-44. While Rose's system does not make price determinations based upon these characterizations, this teaching is supplied by the base reference.

Finally, Appellants also argue that the specific findings of Official Notice above were made in error and requests documentary support for these findings. However, documents to support the findings of Official Notice were provided in the Office Action mailed May 30, 2007. Appellant has not contested that these documents support that the findings of Official Notice are common knowledge in the art, despite ample opportunity to do so. Accordingly, no additional basis exists for withdrawing the rejections of claims 8-10 and 19-21 under § 103(a).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section **(9)** above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) Reopen prosecution. Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be

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relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

Respectfully submitted,

/Daniel Vetter/

Examiner, 3628

A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:

/Wynn W. Coggins/

Director, TC 3600

Conferees:

John Hayes, SPE 3628

/JOHN W HAYES/

Supervisory Patent Examiner, Art Unit 3628

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Vincent Millin /VM/

Appeals Conference Specialist